STATE OF MICHIGAN

COURT OF APPEALS

STACEY SHEIKO, Plaintiff-Appellant,	UNPUBLISHED December 16, 2008
v	No. 277766 Saginaw Circuit Court
UNDERGROUND RAILROAD and VALERIE HOFFMAN, Defendants-Appellees.	LC No. 06-058921-CL

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

In this suit alleging violations of the Michigan's Whistle blowers' Protection Act (WPA), plaintiff appeals as of right the circuit court's order granting summary disposition under MCR 2.116(C)(10) (genuine issue of material fact) to defendants. We affirm.

Plaintiff argues that the court erred in granting summary disposition for defendant because it applied an evidentiary standard inconsistent with the WPA.

We review de novo a motion for summary disposition under MCR 2.116(C)(10). *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 711; 683 NW2d 699 (2004). Additionally, "[w]hether a plaintiff has established a prima facie case under the WPA is a question of law subject to de novo review." *Id.*

In order to prevail on whistleblower claim, a plaintiff must make a prima facie showing that "(1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 184-185; 665 NW2d 468 (2003). Under the Act, a plaintiff engages in protected activity if she has reported, or is about to report, a suspected illegal activity to a public body. *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 610; 566 NW2d 571 (1997).

Here, plaintiff testified that on September 28, 2005 she submitted an anonymous complaint regarding alleged illegal activity at the Underground Railroad to the Attorney General's office via submission of an online complaint form. Plaintiff further stated that a screen "popped up" after she "hit the submission button" which indicated that the complaint "had gone through." Plaintiff alleged that she received a confirmation screen, but she did not retain any documentary proof of the filing. In support of her claim, plaintiff attached an undated copy of

the allegedly filed complaint to the Attorney General's office. However, upon defense counsel's request, the consumer affairs division of the Attorney General's office verified that it did not receive an Internet web complaint against defendants on September 28, 2005 or September 29, 2005. Plaintiff also testified that she told defendant Hoffman at a meeting on September 29, 2005 something to the effect that she had made a report to a governing body or governmental body about concerns that there were illegalities in the organization. Hoffman terminated plaintiff on October 19, 2005, less than three weeks later. The termination occurred though plaintiff's evaluation report in May 2005 referred to plaintiff's efforts as "laudable."

Defendants moved for summary disposition arguing that plaintiff had failed to present evidence that she had filed a complaint. After a hearing, the circuit court stated:

> [T]he Plaintiff argues that she participated in protected activity when she submitted a two page report to the Attorney General on September 28, 2005. If in fact the Plaintiff had filed an internet complaint with the Attorney General, it would have been assigned a complaint department file number . . . . There is no internet/web complaint number against the Underground Railroad or Valerie Hoffman by Ms. Sheiko for September 28 or 29, 2005. The Plaintiff must provide facts from which one could reasonably conclude that she was engaged in a protected activity.
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> This Court concludes that the Plaintiff's claim must fail in that she has failed to provide objective proof that such a complaint was filed. Her claim is unsupported other than by her own comments and an anonymous letter that was allegedly sent of which the receiving party has no knowledge, complaint number or website number or any other identifying characteristic indicating that it was received.

As mentioned, the circuit court granted defendants summary disposition pursuant to MCR 2.116(C)(10).

> MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Generally speaking, where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*. at 363, 547 NW2d

> 314. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen. Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Courts are liberal in finding genuine issues of material fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). [*White v Taylor Distributing Co, Inc*, 275 Mich App 615, 620 n 2; 739 NW2d 132 (2007)].

Defendants' motion for summary disposition challenged whether plaintiff engaged in protected activity. The motion specifically claimed that plaintiff failed to genuinely show that she "reported" or was "about to report" a violation to the Attorney General's office. In support, defendant submitted documentary evidence that the Attorney General had not received a complaint against defendants around the time near plaintiff claimed she had submitted it. The "burden then shifts to [plaintiff] to establish the existence of a genuine issue of disputed fact." *Quinto, supra* at 362; MCR 2.116(G)(3) and (4). Despite this burden plaintiff cites her deposition testimony that she submitted the report online to the Attorney General. Plaintiff's deposition testimony however merely restates allegations in her complaint that she filed a report. Plaintiff has not gone "beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra*. We conclude that plaintiff did not submit sufficient evidence to rebut defendants' evidence that plaintiff did not report a violation to the Attorney General's office. Here, the evidence submitted by defendants showed that plaintiff's claim, i.e. that she had filed a complaint with the Attorney General, lacked genuineness. Under these circumstances, plaintiff's mere insistence that she had filed a complaint with the Attorney General does not restore genuineness to her claim.

Plaintiff also claims that an issue of fact exists because of computer error or that a different department of the Attorney General's office may have the report or that the Attorney General's office misplaced the report. These allegations, however, are purely speculative; further, plaintiff has the burden of establishing the existence of a material factual dispute. *Quinto, supra*.

Finally, plaintiff argues that the circuit court committed reversible error because it failed to consider her argument that she was "about to" report a violation to a public body. Indeed, it does not appear from the circuit court's opinion that it considered plaintiff's argument. However, plaintiff did not plead in her complaint that she was "about to" report a violation and only raised the matter in opposition to defendant's summary disposition motion. Plaintiff cannot fail to raise a claim in the lower court, and then on appeal argue that the court's failure to consider that claim is reversible error. See *Czymbor's Timber, Inc v Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006) ("A party may not take a position in the trial court and subsequently seek redress in an appellate court based on a position contrary to that taken in the trial court.") (citation and quotation marks omitted). For this reason, we conclude that the circuit court did not commit error requiring reversal when it declined to consider plaintiff's argument that she was about to engage in protected activity.

Moreover, although plaintiff did state that she had made a report to a public body, the statement was vague and Hoffman denied that this statement was ever made. MCL 15.363

expressly requires that "[a]n employee shall show by clear and convincing evidence that he or she or a person acting on his or her behalf was about to report, verbally or in writing, a violation or a suspected violation of a law of this state, a political subdivision of this state, or the United States to a public body."

> Clear and convincing evidence is defined as evidence that produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. . . . Evidence may be uncontroverted, and yet not be 'clear and convincing. . . . Conversely, evidence may be 'clear and convincing' despite the fact that it has been contradicted. [*Kefgen v Davidson,* 241 Mich App 611, 625; 617 NW2d 351 (2000) (citations omitted).]

We conclude plaintiff's single, unsubstantiated, uncorroborated deposition statement does not meet the clear and convincing standard under the WPA.

We affirm.

/s/ Joel P. Hoekstra
/s/ Brian K. Zahra